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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6363

DAWN CAROLINE, BY HER MOTHER AND NEXT FRIEND, BRENDA CAROLINE,

Petitioners,

v.

EDWARD REICHER, SIDNEY REICHER, AND REICHER ENTERPRISES, A BODY CORPORATE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant Certiorari to review the action of the Court of Appeals of the State of Maryland in denying the petition of Petitioners to prosecute an appeal in forma pauperis in the Court of Appeals of Maryland where the petition requested that the State of Maryland bear the costs of the appeal, including fees and costs of transcript, arising out of civil litigation between private litigants.

STATEMENT

The trial of the civil litigation between the parties was tried before the Honorable H. Ralph Miller and a jury in the Circuit Court of Montgomery County, State of Maryland beginning on November 15, 1971 and terminating on November 18, 1971 when the jury returned a verdict in favor of the Defendant, Reicher Enterprises, Inc. (the individual Defendants having been granted directed verdicts by the Court at the close of the plaintiffs' case).

The Plaintiffs filed a motion for judgment n.o.v. or in the alternative a new trial. Hearing was held before the trial court on February 4, 1972 and the trial court denied Plaintiffs' motion. On the same date, Plaintiffs filed an appeal to the Court of Appeals of the State of Maryland and the appeal is pending. Plaintiffs filed a petition to prosecute an appeal in forma pauperis on February 18, 1972 in the Court of Appeals of Maryland and the Court of Appeals denied the petition on March 13, 1972.

REASONS FOR DENYING THE WRIT

I.

That neither the common law nor statutory law of Maryland permits an appeal to be prosecuted to the Court of Appeals of Maryland in forma pauperis in a civil cause between private litigants.

The Petitioner relies upon the case of *Cowan v. City of Chester*, 2 Del. Co. 234 (C. P. Pa. 1884) and *McClenahan v. Thomas*, 6 N.C. 198 (1813) as authority that the Statute of Westminster, 11 Henry VII, c.12 (1494) would authorize an appeal in forma pauperis. These cases are not good law in view of the finding of the United States Supreme Court in the case of *Bradford v. Southern Railway Com-*

pany, 195 U.S. 243 (1904). In that case, the Plaintiff in a tort action petitioned the Circuit Court of Appeals for permission to proceed in forma pauperis upon appeal to the Supreme Court under the act of July 20, 1892, Ch. 209, 27 Stat. 252. The Supreme Court held that the act of July 20, 1892 did not authorize prosecution of an appeal to the Supreme Court in forma pauperis. The Court stated at 249-251:

> "There can be little doubt that that statute under which this motion is made should be construed strictly: for the pauper comes to litigate entirely at the expense of others. He is neither to pay his own attorneys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby, in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex then unable to sue. Hist. of Henry VII."

The Statute of Westminster, II, Henry VII, c. 12 (1494), I Alexander's British Statutes 346 (Coe ed. 1912) states at 347, a person permitted to proceed under this Statute "ought not to have a new trial for he has had justice once, nor can he remove his cause out of an inferior Court".

The case of *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1917) decided subsequent to *Bradford v. Southern Railway Company*, *supra*, involved proceedings in a court of original jurisdiction and did not concern non-waivable auxiliary expenses.

In addition, the common law and statutes of England may be abrogated or changed as the General Assembly of Maryland may think most conducive to the general welfare. *State v. Buchanan*, 5 H. & J. 317, 366.

The General Assembly of Maryland, through legislation has provided through Article 36 of the Annotated Code of Maryland a system of fees for the Maryland Court. The General Assembly has also provided for the waiver of these fees or their payment, as well as payment of non-waivable auxiliary expenses, by the State in criminal cases. Md. Code Ann., Art. 5, Sec. 15-15B (1968 Replacement Volume); Md. Rule 883.

The General Assembly has not provided any legislation whereby a litigant in a private civil suit may require the State of Maryland to pay counsel fees and the costs involved in appealing from an adverse verdict by a jury in an action tried in a Circuit Court. It should be noted that the General Assembly has provided that when a civil litigant mades oath that he is unable to pay the cost of docketing his suit and his attorney makes oath that the cause of action is meritorious, the Clerk may waive the required deposit. Md. Code Ann., Art. 24, Sec. 10 (1966 Replacement Volume), however, this deals with proceedings in the court of original jurisdiction and not appellate review after a civil litigant has had a trial of his case in the court of original jurisdiction.

II.

The Maryland Statute requiring a civil litigant to pay specified court costs and certain auxiliary expenses to prosecute an appeal do not violate the equal protection clauses set forth in the Fourteenth Amendment to the Constitution of the United States.

The Petitioner relies upon the cases of *Griffin v. Illinois*, 351 U.S. 12 (1956); *Smith v. Bennett*, 365 U.S. 708 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Rinaldi v. Yaeger*, 384 U.S. 305 (1966) and *Roberts v. LaValee*, 388

U.S. 40 (1967) and admits that all of the aforesaid cases dealt with criminal and not civil litigation, but states that it is difficult to see much difference.

It is submitted that there is a substantial difference between criminal litigation wherein the State is a party and civil litigation between private litigants not involving a public interest.

The Supreme Court has never recognized that a civil litigant should be allowed to proceed in forma pauperis upon appeal.

The Maryland Court of Appeals has denied the existence of a right of a civil litigant to proceed in forma pauperis upon appeal in the case of *Schiller v. Lefkowitz*, 242 Md. 461.

The Court of Appeals of Maryland stated at pages 472-73:

> "Litigants in civil matters are as much entitled to due process of law and all it implies as are defendants in criminal prosecutions. The constitution guarantees apply alike to rights of life, liberty and property. But what the concepts of fairness embodied in due process of law entail necessarily varies with the nature of the litigation. The rights of civil adversaries do not encompass all the protections guaranteed to defendants in criminal cases. In civil cases, the adversaries are generally private parties who stand in pari passu; in criminal matters, the power of the state, with all the resources of government, are pitted against the individual whose liberty or even life is at stake.
>
> "Accordingly, our law has evolved certain protections to defendants in criminal prosecutions which are not applicable to parties in civil litigation. In civil cases, the party who has the burden of proof on all issue must only persuade the trier of the facts that the preponderance of the evidence is on his side; in a

criminal case, the State must prove that the defendant is guilty beyond a reasonable doubt. In a civil case, either party has the right to call his opponent to the stand; in a criminal prosecution, the State cannot force the defendant to testify against himself or comment on his failure to testify. The rights of indigent defendants in criminal prosecutions to court appointed counsel and to a free transcript of the proceedings on appeal are not accorded to indigent civil litigants. It is immaterial here whether these specific protections as well as others which apply only to criminal prosecutions are embedded in specific constitutional guarantees, or have become part of what today we consider due process of law by selective incorporation or have been made applicable to or absorbed into due process by development of the community's sense of justice. They reflect the practical endeavor of our processes of justice to give concrete meaning to the presumption of innocence in which every defendant in a criminal case stands armored. That presumption has no place in civil litigation, not because civil litigation is less important to our legal system or because the parties to it are not entitled to the fairness of procedure applicable to it, but simply because the presumption does not apply."

There is no constitutional requirement for the state to pay the expenses of an appeal by an indigent civil litigant. The federal courts have been unanimous in their finding that the statutory authority to proceed in forma pauperis in a civil matter, 28 U.S.C.A. 1915 (1948) represents a privilege conferred upon the indigent civil litigant by the legislature rather than a legislative expression of a constitutional right. See *Higgins v. Steele*, 195 F. 2d 366, 368; *Spears v. Continental Bus System, Inc.*, 148 F. Supp. 806, 807; *Evensky v. Wright*, 45 F.R.D. 506, 507; *Williams v. Field*, 394 F. 2d 329, 332.

The case of *Boddie v. State of Connecticut*, 395 U.S. 974 concerned itself with prepayment of costs and filing fees in the court of original jurisdiction and not the cost of prosecuting an appeal after the litigant has had trial in the lower court. It has been held that marriage is marked with public interest. *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 296 N.Y.S. 2d 74 (Sup. Ct. 1968).

In the case of *Welsh v. Mignini*, 259 Md. 205 (1970) in which the counsel for petitioner in this case was counsel for appellant, the Court of Appeals remanded the case for a determination of whether appellants were really indigent and it was later determined that appellants were not indigent as alleged and no appeal was prosecuted.

The case of *Ortiz v. Greyhound Corp.*, 192 F. Supp. 903, (D. Md. 1959) concerned itself with the application of the federal statutory law, 28 U.S.C. 1915 and the requirement that before the cost of the transcript be paid for by the United States the trial judge certify that the appeal is not frivolous and does present a substantial question. Judge Chesnut determined that he should resolve his doubts in favor of appellant but provided that the costs of the United States must be repaid by appellant to the United States if appellant was not successful on appeal.

The test was not one of whether the appeal involving private litigants contained interesting and important questions of law and fact as suggested by petitioners' counsel but the application of the federal statutory law providing for prosecution of appeal in forma pauperis in a civil matter, which as set forth aforesaid herein, represents a privilege conferred by statute in federal civil litigation by the legislature rather than the legislative expression of a constitutional right. The legislature of Maryland has not conferred such a statutory privilege with respect to ap-

peals in the state court whereby the State of Maryland would be required to pay the cost of appeals to the Maryland Court of Appeals in ordinary private civil disputes as in the present case.

CONCLUSION

There is no United States constitutional requirement, statute, rule, decision or authority to require the Court of Appeals of the State of Maryland to grant a petition of a civil litigant in a private dispute to proceed in forma pauperis and require the State of Maryland to pay attorney's fees and auxiliary expenses including the cost of a transcript. The petition for Writ of Certiorari should be denied.

Respectfully submitted.

SAMUEL S. SMALKIN.

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Of Counsel:

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